

The Center for United Labor Action and Sibley, Lindsay and Curr Company

The Rochester Joint Board of the Amalgamated Clothing Workers of America, AFL-CIO-CLC and its Agent, The Center for United Labor Action and Sibley, Lindsay and Curr Company. Cases 3-CC-808 and 3-CC-810

March 20, 1974

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS
FANNING AND PENELLO

On January 10, 1974, Administrative Law Judge Herbert Silberman issued the attached Order Dismissing Complaint in the above-entitled cases. Thereafter, the General Counsel and the Charging Party filed exceptions and briefs, and the Respondent, The Rochester Joint Board of the Amalgamated Clothing Workers of America, herein called Respondent ACWA, filed a reply brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached order in light of the exceptions and briefs and makes the following findings:

The Administrative Law Judge dismissed the complaint for two reasons: first, because, in his opinion, the complaint failed to comply with the requirements of Section 102.15 of the Board's Rules and Regulations that it contain a "clear and concise statement of the acts . . . claimed to constitute unfair labor practices," and, second, because the General Counsel refused upon direction by the Administrative Law Judge, pursuant to Section 102.35(1) of the Board's Rules and Regulations, to file a written prehearing brief outlining the theory of the General Counsel's case. Contrary to the Administrative Law Judge, we find that neither of these reasons warranted dismissal of the complaint.

As to the first ground for dismissal, an examination of the complaint reveals that it contains a clear statement of the acts alleged to constitute unfair labor practices and the sections of the Act alleged to have been violated. In addition, the record contains a detailed opening statement by the General Counsel outlining the theory underlying the complaint allegations, and hence the unfair labor practices allegedly committed by the Respondents, together with rele-

vant case law in support thereof. Furthermore, we note that the Administrative Law Judge denied a motion by Respondent ACWA to dismiss the complaint for failure to comply with Section 102.15 of the Board's Rules and Regulations. This we view as being entirely inconsistent with his subsequent dismissal of the complaint for the same reason. Accordingly, we find no basis in the record for, and therefore no merit to, the Administrative Law Judge's finding that the complaint was defective in its pleading because it did not comport with the mandate of Section 102.15 of the Board's Rules and Regulations.¹ We therefore further find that his dismissal of the complaint for that reason was without warrant.

Nor do we find support for the Administrative Law Judge's asserted authority to dismiss the complaint under Section 102.35 of the Board's Rules and Regulations which deals with the duties and powers of an Administrative Law Judge. Authority is granted in subsection (1) of that section "To request the parties at any time during the hearing to state their respective positions concerning any issue in the case or theory in support thereof." As noted previously, the General Counsel made a lengthy and detailed oral statement of the theory of his case and legal citations supporting it. We therefore agree with the General Counsel's contention that the filing of a brief would have served no further purpose. Moreover, if, for some reason, the Administrative Law Judge was not satisfied with the General Counsel's presentation, neither subsection (1) nor any other provision of Section 102.35 sanctions an order by him to the General Counsel to file a written brief or suffer dismissal of the complaint. *Jefferson Stores, Inc.*, 201 NLRB No. 101.

In their exceptions, the General Counsel and the Charging Party contend that the Administrative Law Judge has prejudged the merits of the complaint, and that fairness and justice require the assignment of a new Administrative Law Judge to this case. They rely on statements made by the Administrative Law Judge contained in the record to the effect that some of the allegations in the complaint did not constitute unfair labor practices, that the General Counsel would be precluded from introducing any evidence to support such allegations, and that the General Counsel had not properly prepared his case. They also contend that, without hearing any witnesses, the Administrative Law Judge characterized certain allegations in the complaint as isolated and in the end totally rejected and prejudged the General

¹ Respondent ACWA argues that the General Counsel raised issues not covered by the complaint. We do not by this decision determine whether all issues sought to be litigated by the General Counsel are within the scope of

the complaint. This is a matter to be determined by the Administrative Law Judge who hears this case.

Counsel's case by dismissing the entire complaint *sua sponte*.

We have carefully examined the record and are in agreement with the contention of the General Counsel and the Charging Party that a new Administrative Law Judge should be appointed. In the conduct of our hearings, it is the Board's policy not only to avoid actual partiality and prejudgment, but also to avoid even the appearance of a partial tribunal. Thus, in fairness to the parties herein, as well as to guard the integrity of these proceedings, we shall set aside the Administrative Law Judge's Order Dismissing Complaint and shall remand this proceeding to the Chief Administrative Law Judge for a hearing *de novo* before a different Administrative Law Judge duly designated by him, who shall prepare and serve on the parties a decision containing findings of fact, conclusions of law, and recommendations with respect to the unfair labor practices alleged in the complaint herein.²

ORDER

It is hereby ordered that the Order Dismissing Complaint of the Administrative Law Judge be, and it hereby is, set aside.

IT IS FURTHER ORDERED that a hearing *de novo* be held before a different Administrative Law Judge for the purpose of receiving evidence on the issues raised by the allegations of the complaint.

IT IS FURTHER ORDERED that, upon conclusion of the hearing, the Administrative Law Judge shall prepare and serve upon the parties a decision containing findings of fact, conclusions of law, and recommendations based upon the evidence received and that, following service of such decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, shall be applicable.

² The request for special permission to appeal from the ruling of the Administrative Law Judge that the Charging Party is a "person" within the meaning of the Act, filed by the Respondent Amalgamated Clothing Workers of America, is hereby denied as it raises factual issues which can best be resolved by the Administrative Law Judge at the hearing *de novo*. In addition, since our decision herein is based solely on statements contained in the record, the Respondent ACWA's motions to strike references to off-the-record conversations and discussion of nonrecord events in opposing parties' briefs and letters are hereby denied.

ORDER DISMISSING COMPLAINT

HERBERT SILBERMAN, Administrative Law Judge: For reasons stated on the record the Complaint in these proceedings is dismissed.